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528-097—73——1

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72–1490

FEDERAL POWER COMMISSION, PETITIONER

v.

TEXACO, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–22a) is reported at 474 F. 2d 416. The initial order (No. 428) of the Federal Power Commission (App. 135–154), its order (No. 428–A) of amendment (App. 159–161), and its order (No. 428–B) denying rehearing (App. 238–253) are reported at 45 FPC 454, 45 FPC 548, and 46 FPC 47, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a–25a) was entered on December 12, 1972, and the Commission's petition for rehearing was denied on

February 5, 1973 (Pet. App. 26a–28a). The petition for a writ of certiorari was filed on May 3, 1973, and was granted on October 9, 1973 (App. 254).[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission has authority to exempt small producers from certain filing requirements under the Natural Gas Act, as amended, 15 U.S.C. 717, *et seq.,* and to regulate the interstate wholesale sales of such small producers indirectly by determining, in pipeline rate proceedings, whether the pipelines' costs of purchasing gas from small producers are reasonable.

STATUTES INVOLVED

Sections 4, 5, 7, and 16 of the Natural Gas Act, 15 U.S.C. 717c, 717d, 717f, and 717*o*, are set forth in the Appendix to this brief, *infra,* pp. 35–43.

STATEMENT

A. BACKGROUND

In 1954, this Court held in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, that the Federal Power Commission has jurisdiction under the Natural Gas Act, as amended, 15 U.S.C. 717, *et seq.,* to regulate well-

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[1] The Court concurrently granted the petition in No. 72-1491—which sought review of the same judgment of the court of appeals—and ordered the cases consolidated for oral argument (App. 254).

head sales by producers of natural gas to interstate pipelines. Producers were thus required under section 7(c) of the Act, 15 U.S.C. 717f(c), to obtain certificates of public convenience and necessity to cover their sales to interstate pipelines; all contracts covering such sales were required to be filed with the Commission under Section 4(d) of the Act, 15 U.S.C. 717c(d), and all rates and charges were required under Section 4(a), 15 U.S.C. 717c(a), to be "just and reasonable." Under Sections 4 and 5 of the Act, 15 U.S.C. 717c and 717d, the Commission is empowered to inquire into the lawfulness of any rate and, in the event it finds a rate unlawful, to determine and prescribe the just and reasonable rate.

Following the *Phillips* decision, the Commission at first attempted to regulate producer sales on a traditional, individual basis. After this method of regulation proved thoroughly impractical, the Commission in 1960 instituted area rate proceedings to determine maximum producer rates for each of the major producing areas. See *Permian Basin Area Rate Cases,* 390 U.S. 747, 755–758. The area rate proceedings themselves have proved to be enormously complex, and the Commission has accordingly found its ability to meet its obligations under the Act to regulate producer sales to be critically dependent upon its authority under Section 16, 15 U.S.C. 717*o*, to "classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters."

Indeed, this Court has encouraged the Commission to make liberal use of this statutory authority to treat different classes of producers differently. The suggestion that small producers be exempted from certain provisions of the Act was first made by Mr. Justice Clark in dissent (***Wisconsin*** **v.** ***Federal Power Commission,*** 373 U.S. 294, 329–330) and was later reiterated by him speaking for a majority of the Court (***Federal Power Commission*** **v.** ***Hunt,*** 376 U.S. 515, 527). The Commission followed these suggestions in its first area rate proceeding and exempted small producers from various filing requirements under Sections 4 and 7 of the Act (34 FPC 234, 235). On review, this Court sustained the Commission's separate treatment of small producers; it held (***Permian Basin Area Rate Cases, supra,*** 390 U.S. at 787):

> We conclude that these arrangements did not exceed the Commission's statutory authority. We recognize that the language of §§ 5 and 7 is without exception or qualification, but it must also be noted that the Commission is empowered, for purposes of its rules and regulations, to "classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters." § 16, 15 U.S.C. § 717*o*. The problems and public functions of the small producers differ sufficiently to permit their separate classification, and *the exemptions created by the Commission for them are fully consistent with the terms and purposes of its statutory responsibilities.* It is not without relevance that this Court has previously expressed the belief that

> similar arrangements would ameliorate the Commission's administrative difficulties. See *F.P.C.* v. *Hunt,* 376 U.S. 515, 527. [Emphasis supplied.]

In recent years, the Commission's difficulties in regulating producer sales have been compounded by the increasingly critical shortage of natural gas supplies. This shortage, which has been judicially recognized by this Court and the courts of appeals,[2] has seriously affected the ability of the Nation's major pipelines to meet the demands of their interstate markets. At the current time, 26 curtailment proceedings—of the type before this Court in *Federal Power Commission* v. *Louisiana Power & Light Co.,* 406 U.S. 621—have been initiated before the Commission. It is in this context that the Commission's special treatment of small producers in the instant controversy should be viewed.

B. PROCEEDINGS BEFORE THE COMMISSION

In July 1970, the Commission initiated the present proceedings by issuing a notice of proposed rulemaking proposing to exempt from regulation under the Natural Gas Act all existing and future jurisdictional sales made by small producers[3] (35 Fed. Reg.

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[2] See, *e.g., Federal Power Commission* v. *Louisiana Power & Light Co.,* 406 U.S. 621, 626; *Placid Oil Co.* v. *Federal Power Commission,* 483 F. 2d 880, 894–897 (C.A. 5); *Public Service Commission for the State of New York* v. *Federal Power Commission,* 467 F. 2d 361 (C.A. D.C.).

[3] Small producers are defined as those with jurisdictional sales of less than 10,000,000 Mcf (thousand cubic feet) of gas per year.

12220). Following the receipt of comments from numerous parties (see App. 14–96) and an informal conference among the Commission's staff and interested persons (App. 97–134), the Commission issued Order No. 428 (App. 135–154). In that order, the Commission did not exempt small producer sales from all regulation, but rather adopted a form of regulation which it deemed appropriate in the circumstances.

The purpose and intended effect of the Commission's action were stated in Order No. 428 as follows (App. 137):

> One of the important Commission responsibilities under the Natural Gas Act is to assure maintenance of an adequate gas supply for the interstate market. By our action herein, we are taking an important step forward to meet this responsibility. Upon review of the contentions made by the various parties, we have decided that both existing and future sales of small producers shall be regulated in the manner hereinafter provided.
>
> Such action should encourage small producers to increase their exploratory efforts which are so important to the discovery of new sources of gas. Our purpose in taking action here is not to increase contract prices, but to facilitate the entry of the small producer into the interstate market and to stimulate competition among producers to sell gas in interstate commerce. We seek to assure the small producer that when he enters into a new contract for the interstate sale of gas, the provisions of his contract will not be subject to change. We also want to relieve the small producer of the

> expenses and burdens relating to regulatory matters. Our action should also ease the administrative burdens connected with processing small producer filings.[4]

The action taken by the Commission was to establish a procedure whereby each small producer could obtain a blanket certificate to cover all existing and future sales. Once the blanket certificate was obtained, the small producer would be authorized to sell natural gas at negotiated contract prices whether or not such prices are in excess of the area rates established by the Commission;[5] the small producers were relieved of all filing requirements under the Natural Gas Act or the Commission's regulations other than the requirement to file annual reports (App. 143–144).

The Commission expressly stated that its action does not constitute "deregulation" of small producer sales (App. 138). Such sales would be regulated indirectly through review of purchased gas costs in pipeline rate proceedings (*ibid.*). Pipeline rates would be subject to reduction and refund to the extent that they were based upon small producer rates which were found to be "unreasonably high" in light of "appropriate comparisons with highest contract prices for sales by large

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[4] While the Commission stressed the importance of small producer exploratory efforts, it also noted that actual small producer sales amounted to an average of only 10.52 percent of the needs of interstate pipelines (App. 137).

[5] In Order No. 428–B, modifying Order No. 428 and denying applications for rehearing, the Commission ruled that sales made by small producers under blanket certificates could not be abandoned without Commission authorization pursuant to Section 7(b) of the Act, 15 U.S.C. 717f(b) (App. 242–243).

producers or the prevailing market price for intrastate sales in the same producing area" (App. 142). In order to assure the certainty of the capital flow necessary to encourage exploration and development by small producers, however, the Commission exempted small producers from any refund obligations (App. 142–143).

Finally, the Commission expressed its intention

> * * * to review the prices established in new contracts or contract amendments relating to sales by small producers to assure the reasonableness of the rates charged by such producers pursuant to the action we are taking herein. In the event we determine that this approach is inimical to the interests of consumers, we shall take further action to protect the consumers. [App. 145.]

In April 1971, the Commission issued Order No. 428–A (App. 159–161) prescribing the form of the annual statement to be filed by small producers operating pursuant to blanket certificates. In July 1971, the Commission issued Order No. 428–B (App. 238–253) modifying Order No. 428 in certain respects and denying applications for rehearing.[6]

[6] The Commission subsequently issued two additional orders slightly modifying the reporting requirements under Order No. 428. Order No. 428–C, issued in April 1972 (37 Fed. Reg. 7591), requires pipelines and large producers to estimate the annual volume of gas they purchase from each small producer. Order No. 428–D, issued in May 1972 (37 Fed. Reg. 9559), revises the form of the annual report to be filed by small producers.

C. THE DECISION BELOW

On petitions for review, the court of appeals, with one judge dissenting, set aside the Commission's orders establishing a blanket certificate procedure for small producers (Pet. App. 1a–22a). The court concluded that, by authorizing blanket certificates for small producer sales, the Commission had abdicated its statutory responsibilities under Sections 4 and 5 of the Act, 15 U.S.C. 717c and 717d, to insure that small producer rates will be "just and reasonable" (*id.* at 10a–16a). The court rejected the Commission's contention that small producer sales could appropriately be regulated indirectly by reviewing the reasonableness of purchased gas costs in pipeline rate proceedings, because in its view the Commission's order ties the reasonableness determination to "factors which it does not regulate or which derive solely from market forces" (*id.* at 12a).[7]

Judge Fahy dissented. Citing this Court's recent decision in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, he concluded (*id.* at 19a–20a):

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[7] The Commission issued a number of blanket certificates to small producers under Order No. 428 prior to the court's decision. It has subsequently issued "temporary certificates" permitting small producers to collect their contract rates in accordance with Order No. 428 but providing that the amounts collected will be subject to refund with interest if the court of appeals' decision is upheld by this Court.

> The Commission has made a judgment which I think is within the ambit of its competence and expertise not to require small producers to be bound to the area rate and certain filing requirements, on an experimental basis. * * * The Commission is attempting to learn whether under this program the small producers, relieved of much of the burden of regulation required of other classifications, can improve their exploratory efforts while charging rates which on review will nevertheless prove to be just and reasonable, and which will not adversely affect the consumer interests protected by the Act. [Footnotes omitted.]

SUMMARY OF ARGUMENT

A. Central to the decision below is the court of appeals' view that the Commission, in Order No. 428, has abdicated its responsibility under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717d, to ensure that small producers' rates are "just and reasonable." That is not, however, the effect of the order. It does not deregulate the sales of small producers; it establishes a new method of regulating such sales. Instead of the traditional review at the producer level, the order provides for indirect review in pipeline rate proceedings, where the Commission will determine whether the pipeline's costs—*i.e.,* the small producer's rates—are unreasonably high.

Contrary to the court of appeals' view, the reasonableness determination will not depend exclusively on field prices. The order does refer to two field price factors that the Commission will take into account, but reasonableness remains the standard and the Com-

mission stated that it would "consider *all* relevant factors" (App. 142; emphasis added).

B. The issue, therefore, is not whether small producers may be exempted from rate regulation but whether it is consistent with the provisions of the Natural Gas Act for their rates to be regulated indirectly at the pipeline level. The Act does not limit the Commission to any particular regulatory method; "[u]nder the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling" (*Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 602). Order No. 428 is reasonably designed to stimulate exploration, and thus increase the supply of natural gas, while ensuring that small producer rates remain "just and reasonable." It assures small producers—traditionally responsible for 80 percent of the natural gas exploration—an adequate and stable flow of revenue to support exploratory activity by permitting them to collect their negotiated contract prices without refund obligation; but it does not foreclose prospective reductions of prices found to be unreasonably high. Since pipelines may pass on only that portion of a small producer's rate increase that is not unreasonably high, they have a strong incentive to negotiate for the lowest prices they can obtain.

The Commission's authority to treat small producers as a separate class—because of their unique "problems and public functions" (*Permian, supra,* 390 U.S. at 787)—is settled. The Commission properly determined that Order No. 428 would result in increased ex-

ploration with only a minimal increase in the price of gas to the consumer, since small producers, though responsible for most of the exploration, account for only about 10.5 percent of the gas transported by interstate pipelines.

The order does not unfairly burden pipelines by requiring them to show that their purchased gas costs are reasonable. That obligation is imposed by Section 4(e) of the Act, 15 U.S.C. 717c(e), and pipelines have always been required to demonstrate the reasonableness of their costs. Nor is the standard vague. Apart from their familiarity with its application in other contexts, the pipelines are given further guidance by the order, which specifies two field price factors that the Commission will weigh in determining the reasonableness of purchased gas costs.

The Commission recognizes that this plan is experimental and must be closely monitored. It should be given an opportunity to determine whether the experiment is an appropriate solution for some of its "intensely practical difficulties" (*Permian Basin Area Rate Cases,* 390 U.S. 747, 790) in assuring an adequate supply of gas at reasonable prices.

ARGUMENT

THE FEDERAL POWER COMMISSION HAS AUTHORITY TO EXEMPT SMALL PRODUCERS FROM CERTAIN FILING REQUIREMENTS UNDER THE NATURAL GAS ACT AND TO REGULATE INDIRECTLY THE RATES AT WHICH SUCH SMALL PRODUCERS MAKE INTERSTATE WHOLESALE SALES BY DETERMINING, IN PIPELINE RATE PROCEEDINGS, WHETHER THE PIPELINES' COSTS OF PURCHASING GAS FROM SMALL PRODUCERS ARE REASONABLE

A. THE DECISION OF THE COURT OF APPEALS RESTS UPON A MISINTERPRETATION OF THE COMMISSION'S ORDER

In the court of appeals' view, the "essential flaw in the Commission's plan" (Pet. App. 12a) is that Order No. 428 would permit small producers to sell natural gas at rates that may be "unjust" or "unreasonable" in violation of Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717d, and that it therefore amounts to an "abdicat[ion of the Commission's] regulatory responsibility in derogation of the purposes and mandatory terms of the statute" (*id.* at 12a–13a). We submit that the Commission's plan has no such flaw. It does not abandon the "just and reasonable" standard of Sections 4 and 5; rather, it establishes an innovative method of indirect regulation, which ensures both that small producers' rates meet the statutory standard and that small producers are encouraged "to increase their exploratory efforts which are so important to the discovery of new sources of gas" (App. 137).

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The Commission emphasized that its action was *not* "deregulation of sales by small producers" (App. 138). Such sales "*shall* be regulated" (App. 137; emphasis added). In lieu of the traditional rate review procedures, however, the Commission established the following regulatory plan.

(1) To encourage exploratory activity by small producers and "to facilitate [their] entry * * * into the interstate market" (App. 137), small producers will be granted, upon application, blanket certificates authorizing them to sell gas at whatever contract rates they are able to negotiate.[8] Those rates may be collected without refund obligation (App. 142, 143, 242); the small producers may therefore rely upon them in planning their exploratory activity.

(2) The negotiated rates are not, however, insulated from Commission review. That review is undertaken in rate proceedings instituted by pipelines and large producers that purchase gas from small producers. The pipelines and large producers are permitted under the order to seek rate increases "tracking" the small producers' rate increases. The tracking increases, like the small producers' rates, may be collected without refund obligation, but only to the extent that the small producers' rates—*i.e.*, the pipeline's purchased gas costs—are not themselves "unreason-

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[8] The rate may not, however, exceed the established area maximum rate if it is brought above the maximum rate by operation of certain impermissible price escalation provisions (App. 138, 149–150). See 18 C.F.R. 154.93; *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33.

ably high" (App. 140, 142).[9] A tracking increase which is based on "unreasonably high" small producer rates may be suspended by the Commission and is subject to reduction and refund (App. 142, 143). Since the pipeline cannot itself obtain a refund from the small producer, it has an incentive to negotiate contract rates that are as low as possible, and "the market mechanism * * * will be protective of consumer interests" (App. 143).

(3) If the Commission determines in a pipeline proceeding that a small producer's contract rates are unreasonably high, it remains free to initiate a separate proceeding under Section 5(a) of the Act to consider ordering a prospective reduction of the rate. Nothing in the order forecloses such prospective reduction; indeed, the Commission stated its intention "to review the prices established in new contracts or contract amendments relating to sales by small producers to assure the reasonableness of the rates charged by such producers" (App. 145).

The heart of this regulatory plan is that the Commission determines, in the pipeline or large producer

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[9] There are other limitations, but they do not bear directly on the issues in this case. A pipeline may file a special tracking application without the usual supporting documentation only if the small producers' rate increases have affected the pipeline's average cost of purchased gas by at least one mill per Mcf (App. 143). A large producer, ordinarily bound by maximum area rates and moratoria on filing rate increases, may nonetheless apply for tracking increases, but only if the increases are permitted by the producer's contracts with its purchasers (App. 140, 240) and only if the differential between its purchase and resale prices is "consistent with prevailing price differentials in the area" (App. 140).

rate proceeding, whether the small producers' prices are "unreasonably high." In effect, this is the full equivalent of the statutory "just and reasonable" standard. Order No. 428 specifies that the reasonableness determination would include "appropriate comparisons" of the contract price with two market factors: the "highest contract prices for sales by large producers"[10] and "the prevailing market price for intrastate sales in the same producing area" (App. 142).

The court of appeals read the Commission's order as tying the reasonableness determination *exclusively* to these two factors. It stated (Pet. App. 12a):

> Whether or not these two factors would establish precise boundaries on acceptable rates, the Commission has clearly tied its determination to factors which it does not regulate or which derive solely from market forces. * * *

This is the basis of the court's view that, "even granting the legitimacy of indirectly regulating small producer rates, the standards set forth in Order No. 428 have not been demonstrated to have any relationship at all to the statutory standard" (*id.* at 12a, n. 20),

[10] Large producers frequently contract to sell their gas to pipelines at rates that exceed the applicable area maximum rate. Although the Commission attaches conditions to its Section 7 certification of such sales to limit the rate to the maximum for the area, the contract rate has independent significance. First, if area ceiling rates are raised, the producer can increase its rates only if the contract permits such an increase. Second, unless an area moratorium is in effect, the producer can seek to increase its rates above the area ceiling; though the Commission would suspend any such rate pending a hearing under Section 4(e), the producer would be free to collect the higher rate in the interim, subject to refund.

and that "the Commission here abandoned *any* future rate review under the 'just and reasonable' standard" (*id.* at 13a, n. 21; emphasis in original).

But the order does not imply that the two stated factors are the *only* ones that may be considered. To the contrary, the standard is one of reasonableness, and the order specifies that in applying that standard "[t]he Commission shall consider *all relevant factors*" (App. 142; emphasis added). The two unregulated market price considerations are among those "relevant factors" that the Commission will take into account. They were separately identified in the order, not because they were intended to have necessarily controlling importance, but because the Commission wished to signal a departure from its traditional practice of subordinating field prices to other factors in fixing area rates. See, *e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 792, upholding the Commission's rejection of a "contention that area rates should be derived from field, or contract, prices." [11]

The order was thus designed to put producers and pipelines on notice that in the context of small producer rate increases, the field prices *would* be considered along with the traditional elements of a rate-

[11] *Permian* did not hold, however, that "field prices" are irrelevant in determining just and reasonable rates, only that the Commission "was not compelled to adopt field prices as the basis of it computations of area rates" (390 U.S. at 795). Indeed, the court stated that "records in subsequent area proceedings may more clearly establish that the market mechanism will adequately protect consumer interests" (*ibid.*).

base formula. As the Commission stated in Order No
428–B (App. 246):

> The standard * * * provides pipelines with
> more concrete guide for their future action
> than would exist in the absence thereof. Simpl
> put, the Commission wanted the pipelines t
> know in advance the boundaries within whic
> they could freely contract with small producer

In concluding, contrary to the terms and effect o
the order, that the Commission's plan amounted t
"*non*regulation" of small producers' rates (Pet. App
16a, 17a), the court of appeals was apparently misle
by one statement in Order No. 428 and another in th
Commission's brief in the court of appeals. The orde
stated that the Commission "disagree[s] with the argu
ment that the provisions of Sections 4, 5 and 7 of th
Act * * * are mandatory and leave no room for ad
ministrative judgment and discretion" (App. 136
The court viewed this as a claim that "the FPC ca
simply choose not to regulate rates" (Pet. App. 14a

In context, however, it was only a rejection of th
argument that the Act leaves no room for departur
from the traditional method of *direct* regulation. In
deed, in the next paragraph of the order, the Com
mission unambiguously stated that "existing and fu
ture sales of small producers *shall* be regulated
(App. 137; emphasis added). The Commission ha
not asserted any authority "not to regulate rates
(Pet. App. 14a); it has sought only to adopt a ne
method of regulation designed to meet present ex
gencies.

The statement in the Commission's brief was similarly read out of context. In the section of the brief showing that Order No. 428 complied with the applicable provisions of the Administrative Procedure Act, the Commission addressed the contention that the APA's formal adjudicatory procedures should have been invoked because the order was based on Sections 4 and 5 of the Act. The Commission's response was that the order was *not* based on Sections 4 and 5 in the sense required to invoke the formal hearing provisions of the APA, because the "order does not purport to determine the just and reasonable rates for sales by small producers" (Br. 35). This is not, as the court viewed it (Pet. App. 14a), a concession that the "just and reasonable" standard has been abandoned. It is only a statement that Order No. 428, while establishing a new procedure for regulating small producers' rates, was properly issued without formal adjudicatory proceedings because it did not itself *fix* the rates of any producer.[12]

Order No. 428 is, therefore, quite different from the order the court of appeals thought it was setting aside.

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[12] We do not mean to suggest that an order which does fix producer rates must always follow a formal hearing. In an area rate proceeding, for example, where "[n]o effort [is] made to single out any particular [party] for special consideration based on its own peculiar circumstances" (*United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 246), the Commission may properly proceed without a formal hearing. See *Phillips Petroleum Co.* v. *Federal Power Commission*, 475 F. 2d 842 (C.A. 10), pending on petition for a writ of certiorari, No. 73-91; *Mobil Oil Corp.* v. *Federal Power Commission*, C.A.D.C., No. 72-1471, decided July 11, 1973.

The order does not deregulate sales by small producers, does not abandon the statutory "just and reasonable" standard, and does not tie small producers' prices "to the free market, by administrative agency fiat" (Pet. App. 16a). Rather, it establishes for small producers a method of indirect producer rate regulation at the pipeline level, it provides for a determination of the reasonableness of the rates based in part upon field prices, and it ensures both that the ultimate consumer is fully protected against the effects of unreasonably high small producer rates and that the pipelines have a strong incentive to negotiate for producer rates that are sufficiently low to permit them to track the rates without refund obligations.

B. THE COMMISSION MAY PROPERLY REGULATE SMALL PRODUCERS' RATES INDIRECTLY ON AN EXPERIMENTAL BASIS

The remaining question—whether the Natural Gas Act bars the Commission from regulating small producers' sales indirectly at the pipeline level—was not reached by the court of appeals, because it thought that the Commission's order provided for "*non*regulation" (Pet. App. 16a, 17a) rather than indirect regulation. The court did acknowledge, however, that indirect regulation "might" be adequate under the statute "if the Commission had provided that small producer rates could only be passed along on resale as legitimate costs if they met the 'just and reasonable'

standard" (*id.* at 10a).[13] That, as we have shown, is precisely what the Commission's order does provide.

1. The Commission's order should be upheld if the regulatory plan it establishes is reasonably designed to result in just and reasonable small producer rates.

There is nothing in the Act that requires the Commission to regulate producers' rates directly or to employ *any* particular regulatory method. See *Southern Louisiana Area Rate Cases,* 428 F. 2d 407, 415–416, n. 9 (C.A. 5), certiorari denied, 400 U.S. 950. "[R]atemaking agencies are not bound to the service of any single regulatory formula" (*Permian, supra,* 390 U.S. at 776–777). Section 4(a) of the Act directs only that producers' rates "shall be just and reasonable." It does not specify the means by which that result is to be accomplished but entrusts that determination to the Commission's expert judgment. Thus, "[u]nder the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling" (*Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 602). The Commission is "permitted, unless [its] statutory authority otherwise

[13] The court added that it might then doubt "the validity of subjecting the pipelines and large producers, who have made *unrefundable* payments to small producers, to the risk of *later* Commission determination, under such an imprecise standard, that the rates paid could not be passed along as legitimate costs" (Pet. App. 10a, n. 17; emphasis in original). We show below that the standard of reasonable costs, traditionally applied in pipeline rate proceedings, is not impermissibly vague.

plainly indicates, 'to make the pragmatic adjustments which may be called for by particular circumstances'" (*Permian, supra,* 390 U.S. at 777, quoting from *Federal Power Commission* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 586).

Section 16 of the Natural Gas Act, 15 U.S.C. 717o, "assures the [Commission] the necessary degree of flexibility" (*Federal Power Commission* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 642) to make those "pragmatic adjustments." It provides:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. * * * For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. * * *

In construing the scope of the Commission's authority under Section 16, this Court has stated that "the width of administrative authority must be measured in part by the purposes for which it was conferred" (*Permian, supra,* 390 U.S. at 776). The Commission's responsibility for regulating the wholesale distribution of making, "a balancing of the investor and the consumer interests" (*Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 603) to the end that prices are only as high as is necessary to ensure an adequate supply of gas for the public and a fair return for the investor. ~~"Surely the Commission's broad responsibilities there-~~

natural gas in interstate
Commerce requires, in

fore demand a generous construction of its statutory authority" (*Permian, supra,* 390 U.S. at 776); it must "be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties" (*id.* at 790).

It is in light of these principles that Order No. 428 should be viewed. The test of its validity under the Act is whether the plan it establishes is reasonably designed to ensure just and reasonable small producer rates. Like any other exercise of the Commission's judgment in its efforts to achieve the statutory objectives, the order is entitled to a "presumption of validity" (*Permian, supra,* 390 U.S. at 767; *Hope Natural Gas Co., supra,* 320 U.S. at 602), and "he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences" (*ibid.*). Respondents have not overcome that presumption.

2. The order establishes a reasonable plan to stimulate exploration, increase supply, and maintain reasonable price levels.

The court of appeals aptly summarized the regulatory problem that led to the issuance of Order No. 428:

> A critical gas shortage * * * faces the nation. The Federal Power Commission is confronted with an ever-increasing regulatory burden—and limited resources. These combine to produce administrative delay and threaten the Commission's ability adequately to control natural gas prices. [Pet. App. 5a–6a.]

Thus, the Commission's responsibility is to try to ensure an increased supply of natural gas while avoiding unreasonably high prices to consumers.

The Commission's efforts to meet this difficult responsibility have necessarily involved innovative and imaginative use of the characteristic flexibility of the administrative process. For example, it has set maximum producer rates on an area-wide basis; it has sought to use price functionally to stimulate exploration and dedication of reserves to the interstate market; and it has exempted the small producers from some of the usual filing requirements under the Act and the regulations. More recently, it commenced rulemaking proceedings to set just and reasonable rates on a *nation*-wide basis (38 Fed. Reg. 10014 and 14295).

In Order No. 428, the Commission's focus was upon the small producers. As the court of appeals observed (Pet. App. 6a), "small gas producers have historically accounted for as much as 80% of new exploration" but only "for 10.5% of the gas put into pipelines * * *." Their difficulty has been that they "have less ready access to the necessary capital than do large producers" (*ibid.*).

The Commission's plan is an innovative effort to stimulate small producer exploration with only such minimal price increases to consumers as are just and reasonable in the circumstances. Order No. 428 relieves small producers from the costly burden of regular administrative proceedings, and thereby frees the Commission to give greater attention to the large producers. To assure the small producers an adequate and stable flow of revenue

to facilitate their exploratory activity, the order permits the producers to collect their negotiated contract prices subject only to the risk of prospective reduction by the Commission in appropriate cases.

Since small producers account for only a small proportion of the gas transported by interstate pipelines (App. 137), the Commission had reason to anticipate that the impact on consumers of any higher prices that might result would be minimal (App. 2). To ensure that the market mechanism works effectively and that prices do not rise unreasonably, however, the order provides that purchasers from small producers may pass on to their customers only that part of a producer rate increase that is not unreasonably high. Were it otherwise, the pipeline purchasers would have less incentive to bargain hard, for they would be free to pass on even unreasonably large increases. The Commission did not foreclose prospective reduction of a small producer's rate that has been found unreasonably high in a pipeline rate proceeding.

Finally, the order provides that a small producer may not abandon the sale of gas under any contract, even after the contract has expired, without first obtaining authorization from the Commission under Section 7(b) of the Act, 15 U.S.C. 717f(b).[14] This means

[14] Section 7(b) prohibits abandonment of any service "without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

that the Commission will be able to exert a further stabilizing influence over prices. If a producer and a pipeline cannot agree on the terms of a new contract, the Commission remains free to determine that the public convenience and necessity would not be served by an abandonment. The producer would then be required to continue supplying gas at the price stipulated in the old contract, unless it applied to the Commission for an increase under Section 4(d) of the Act, 15 U.S.C. 717c(d).

The court of appeals took exception to the Commission's plan only because of its mistaken assumption that the order would remove all constraints on small producer rates. Even so, it characterized the plan as "imaginative" (Pet. App. 5a), and stated that "[t]he Power Commission has made a conscientious and intelligent effort to cope with an enormous national problem" (*id.* at 17a). That effort is necessarily experimental, for it cannot now be known with complete confidence whether it will produce all the desired results. The Commission fully recognizes its obligation to monitor the plan closely, and it specifically stated in Order No. 428 that, "[i]n the event we determine that this approach is inimical to the interests of consumers, we shall take further action to protect the consumers" (App. 145).

Order No. 428 is thus a reasonably designed plan to encourage the discovery of new gas reserves and the dedication of those reserves to the interstate market at prices that are just and reasonable. It strikes a proper balance between the investor and consumer

interests. Although the order departs from the usual regulatory method of direct rate review, its objective—an adequate supply of gas at reasonable rates—is the same. Particularly in view of the urgent gas shortage, the Commission should be afforded a "reasonable opportunity" (*Permian, supra,* 390 U.S. at 790) to determine through experience whether this pragmatic adjustment in its method of regulation is, in practice as well as in theory, "appropriate for the solution of its intensely practical difficulties" (*ibid.*).

3. Order No. 428 does not treat large producers or pipelines unfairly.

The Commission's plan excuses small producers from the price constraints imposed upon large producers by the maximum area rate level. The order also eliminates for small producers the risk that they will be ordered to refund any collected rates that are later determined to be unreasonably high. At the same time, pipelines and large producers that purchase from small producers remain subject to the risk of refund if their purchased gas costs—*i.e.,* the negotiated small producer rates—are unreasonably high. Though pipelines and large producers are thus treated differently from small producers, the differences are justified under the Natural Gas Act and do not impose unfair burdens upon pipelines or large producers.

Section 16 of the Act, 15 U.S.C. 717*o,* gives the Commission broad power to establish different classes of persons subject to its jurisdiction and to treat the classes differently:

> For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. * * *

The only limitation upon that authority is that the Commission must find the rules and regulations to be "necessary or appropriate to carry out the provisions of this Act" (*ibid.*). The treatment of each of the classes in Order No. 428 was properly found by the Commission to be "necessary and appropriate for the administration of the Natural Gas Act" (App. 145).

a. The Commission's authority to treat small producers as a separate class is settled. This Court in *Permian* held that "[t]he problems and public functions of the small producers differ sufficiently to permit their separate classification" (390 U.S. at 787).[15]

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[15] The Court described the unique problems of small producers as follows (390 U.S. 784–785):

"Although the resources of the small producers are ordinarily more limited, their activities are characteristically financially more hazardous. It appears that they drill a disproportionately large number of exploratory wells, and that these are frequently in areas in which relatively little exploration has previously occurred. Their contribution to the search for new gas reserves is therefore significant, but it is made at correspondingly greater financial risks and at higher unit costs. The record before the Commission included evidence that, for this and other reasons, small producers have regularly suffered higher percentages of dry wells, and higher average costs per Mcf of production. At the same time, the Commission found that small producers are the source of only a minor share of the total national gas production, and that the prices they have received have followed closely those obtained by the larger producers." [Footnotes omitted.]

In that case, the Court upheld small producer exemptions from certain filing, reporting, and price adjustment obligations.

The result of the filing and reporting exemptions in the present case is to permit the small producers to exceed the area maximum rate level. Section 16, 15 U.S.C. 717*o*, authorizes the Commission to permit different rate levels where they are "necessary or appropriate to carry out the provisions" of the Natural Gas Act. In *Permian*, this Court accordingly upheld a two-price rate structure under which "two producers, simultaneously offering gas of identical quality and BTU content, may be confronted by different maximum prices" (390 U.S. at 795–796). The Court held that "the statutory 'just and reasonable' standard permits the Commission to require differences in price for simultaneous sales of gas of identical quality, if it has permissibly found that such differences will effectively serve the regulatory purposes contemplated by Congress" (*id.* at 797–798).

Thus, the court of appeals considered it "certainly conceivable" that, "[g]iven the special problems and practices of small producers," the Commission could "set a just and reasonable rate for small producers higher than that for large producers" (Pet. App. 16a). The Commission has not set a higher rate level for small producers in Order No. 428, but it has determined that the reasonableness of small producer rates may depend in part on different considerations and that those rates therefore need not be limited to the area ceilings applicable to large producer rates. We have already explained the basis of the Commission's determination that this approach is a necessary and appropriate means for stimulating exploratory activity.

The court of appeals expressed concern that the Commission might "proceed to establish another class of 'medium' producers, and provide the same or different appropriate exemptions for this new class" (Pet. App. 15a). But this concern was based on its mistaken view that the exemptions established by Order No. 428 would suspend the "just and reasonable" standards of Section 4(a). It stated that, "[i]f Order No. 428 is upheld, no limit appears which could halt gradual erosion of the statutory standard's applicability," and determining rates under the "just and reasonable" test would become "the exception rather than the rule" (*id.* at 16a).

As we have shown, however, Order No. 428 does *not* abandon the statutory standard; it adopts a new technique for applying it. If that technique or a similar one were later deemed appropriate for regulating the sales of some intermediate class of producers, and if the "problems and public functions" (*Permian, supra,* 390 U.S. at 787) of that intermediate class were sufficiently different from those of the remaining classes, then it, too, could be accorded different treatment under the Act. Even if an intermediate classification could *not* be justified, however, that would not be a reason to disapprove the small producer classification established here. If, as we have shown, the Commission's order is consistent with the provisions of the Natural Gas Act, it is no less lawful because a hypothetical order might sometime in the future establish an impermissible classification.

b. The pipelines and large producers have argued that the Commission's order unfairly shifts from pro-

ducers to purchasers the burden of establishing the reasonableness of the producers' rates. They object to the provisions of the order that excuse small producers from refund obligations while permitting purchasers to track only those increased rates that are not unreasonably high. In their view, the Commission was required either to subject the producers to refund obligations or to free the purchasers from such obligations.

Either alternative, however, would undermine the effectiveness of the order. The Commission's plan is designed to assure a stable flow of revenue upon which small producers may depend in undertaking natural gas exploration. Eliminating the risk of refunds is an essential element of that plan.[18] While Section 4(e) of the Act, 15 U.S.C. 717c(e), authorizes the Commission to order refunds, it does not require it to do so.

Similarly, if the purchasers from small producers were free to pass on to their customers even unreasonably high small producer price increases, the market mechanism on which the Commission's order in part relies would be markedly less effective. Purchasers would have a smaller stake in the rate level,

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[18] Although the Commission retains the authority to order *prospective* reductions of unreasonably high small producer rates, the disruptive effect of a prospective change, involving no refund of rates already collected, is not likely to be as great as that of a retrospective change. The Commission could properly determine that the countervailing harm that might result from requiring a purchaser to absorb refunds over the whole term of a contract justifies a different rule with respect to prospective reductions.

and market forces would be a less reliable check on rate increases. Requiring pipelines and large producers that purchase from small producers to bear part of the economic consequences of an imprudent bargain is thus central to the scheme of Order No. 428.

The Act does not limit the Commission to regulating rates directly at the producer level. Nor does it guarantee pipelines and other purchasers that they will be entitled to pass on any purchased gas costs, regardless of the reasonableness of those costs. That the Commission has exercised its authority in the past to review producers' rates in producers' proceedings and to permit purchasing pipelines to pass on the approved increases does not mean that it cannot now adopt a different method of regulation. Cf. *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9, 47–52.

What matters under the Act is "the result reached not the method employed" (*Hope Natural Gas Co., supra*, 320 U.S. at 602). Since the Commission's order is reasonably designed to result in rates that are just and reasonable, it should not be disapproved on the ground that the method it establishes would require purchasers to demonstrate that they have entered reasonable contracts. Indeed, as the Commission pointed out in Order No. 428–B, that obligation—embodied in Section 4(e) of the Act [17]—is not a new one for natural gas pipelines (App. 245):

[17] Section 4(e), 15 U.S.C. 717c(e), provides: "At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company * * *."

> Ever since the passage of the Natural Gas Act in 1938, pipelines as regulated public utilities have been permitted to include in their cost of service only those operating expenses, including the cost of purchased gas, which are reasonable. While our order [No. 428] placed emphasis on that duty, it did not effectuate any basic change in the pipelines' obligations in this regard. These obligations would exist even if nothing had been said in the order.

c. The pipelines and large producers argue, however, that the standard of reasonableness is impermissibly vague and fails to provide an adequate guide to purchasers in evaluating the risks of entering into a contract at a particular rate. But reasonableness is the statutory standard governing all rate matters under the Natural Gas Act. Companies that are subject to the Commission's jurisdiction can hardly claim unfamiliarity with the standard; the pipelines' rate base has always been limited to reasonable costs.

Moreover, the Commission specifically mentioned two factors that it would consider in determining the reasonableness of a pipeline's purchased gas costs—the "highest contract prices for sales by large producers" and "the prevailing market price for intrastate sales in the same producing area" (App. 142). As the Commission noted, these factors provide "pipelines with a more concrete guide for their future actions" (App. 246).

A purchaser of gas is thus not without the wherewithal to determine the limits of reasonableness. Conscientious consideration of prevailing intrastate prices

and large producer contract prices—together with the currently effective area ceiling rates, any ongoing large producer rate proceedings, and the traditional elements of a small producer's rate base—will permit a gas purchaser to estimate with confidence the limits of a reasonable small producer rate. And the Commission's determinations in future pipeline rate proceedings will, of course, provide further indication of the manner in which the standard will be applied. The Act requires no more; certainly nothing in the Act provides purchasers with a risk-free guaranty either that all their costs will be controlled or that they will be able to pass on to consumers all the costs they incur, however unreasonable those costs may be.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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DECEMBER 1973.

15 U.S.C. 717, et seq

APPENDIX

The Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, provides in pertinent part:

Section 4, 15 U.S.C. 717c:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and

charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but

not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5, 15 U.S.C. 717d:

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any

rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Section 7, 15 U.S.C. 717f:

CONSTRUCTION, EXTENSION, OR ABANDONMENT OF FACILITIES; CERTIFICATE OF CONVENIENCE AND NECESSITY; CONDEMNATION PROCEEDINGS

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it

may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers,

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extension thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commis-

sion authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such man-

ner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by

contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Section 16, 15 U.S.C. 717*o*:

ADMINISTRATIVE POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations

may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

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